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No. 80-2178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN S. TOLL, PRESIDENT, UNIVERSITY OF MARYLAND,
AND
UNIVERSITY OF MARYLAND,
Petitioners,

v.

JUAN CARLOS MORENO, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

In a long brief marked with legal and factual inaccuracies and inconsistencies,[1] the student-respondents have

[1] Although denied permission to exceed the 50-page limitation of Rule 34 the respondents have filed a 48-page brief with 42 footnotes and eight-pages of "addenda" containing additional

striven to reformulate the issues in this case to their liking. However, no amount of words can disguise the basic unfairness of the positions advanced by the bank students (and the international banks that have been the real parties in interest throughout this litigation)[2] or the unsoundness of the legal principles they urge upon the Court.

The key issue in this case is whether, *as a general legal proposition*, a state classification disadvantaging nonimmigrants, who in many respects are exempt from the burdens imposed upon citizens and resident aliens, must be gauged by the strict scrutiny equal protection standard. If strict scrutiny is not the standard, the Court must decide if, *under the facts of this particular case*, the University of Maryland's policy of denying in-state tuition and fees to nonimmigrant aliens is rationally related to a legitimate end. Contrary to the suggestions of the international bank students, the determination of the latter issue does not turn on whether the classification established by the University is precise or perfect. Rather, the inquiry is "whether the restriction reaches so far and is so broad and haphazard" as to belie the University's claimed rational bases. *See Cabell v. Chavez-Salido*, 50 U.S.L.W. 4095, 4097 (U.S. Jan. 12, 1982).

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argument. The petitioners will not add unnecessarily to the overabundance of materials before the Court and, for this reason, have prepared summary responses to most of the international bank students' contentions and have included them in an appendix to this reply brief.

[2] Throughout this litigation, the nominal respondents have pursued this case at the instance of, and financed by, the International Bank for Reconstruction and Development ("the World Bank") and the Inter-American Development Bank ("the IDB"). Now, after almost seven years, during which numerous opinions have been written in this case including two by this Court, the two parties plaintiff in this case — the World Bank and the IDB — have appeared for the first time, as *amici curiae* in support of the respondents.

The petitioners submit that in this case, at the very least, their interest in equalizing the costs of a University education between those who have and those who have not fully contributed to its support through income tax contributions or otherwise is eminently rational when "judged by reference to characteristics typical of the affected classes." *Califano v. Jobst*, 434 U.S. 47, 55 (1977).

That is not to say that every state classification disadvantaging nonimmigrant aliens can necessarily be similarly justified even under a rational basis standard. For example, a state ban on the holding of *all* civil service jobs by nonimmigrants premised on a lack of tax contributions rationale might fail because the State, for the most part, could tax the earnings of such persons from state employment. And an attempt by the State to charge nonimmigrant alien children public school tuition purportedly justified on a tax contribution theory might fall because the primary source of funds for public school education in Maryland is the local property tax to which nonimmigrants may contribute.[3] However, because the operation of the University of Maryland is funded primarily from income tax revenues and because nonimmigrants generally and G-4 aliens especially do not pay their full share of the state income tax, the line drawn by the University should stand.

The purpose of this reply brief is to dispel whatever confusion the international bank students have created on the equal protection and due process issues in this case and to respond to the alternate ground advanced by the students and the international banks that the University's

[3] Of course, nonimmigrants are not barred from state employment in Maryland. And all individuals present in Maryland, regardless of citizenship or domicile (including nonimmigrants and illegal aliens), have a right under the state constitution to a free public school education. *See David M. Armour, et al. v. Board of Education of Montgomery County, Maryland*, No. 79-10, Maryland State Board of Education (Sept. 14, 1979).

in-state policy somehow interferes with the international agreements entered into by the banks.

I.

THE UNIVERSITY'S IN-STATE POLICY DOES NOT DISCRIMINATE AGAINST A SUSPECT CLASS AND IS RATIONALLY SUPPORTED BY IMPORTANT STATE INTERESTS.

The University's in-state policy is not directed at resident aliens; nor does it harm them. See *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977).[4] Indeed, its exclusions are not solely aimed at nonimmigrants. Numerous citizens are disadvantaged by the policy.

The international bank students misread the policy when they contend that the University inquires into the domicile of members of the Armed Forces assigned to the University for educational purposes. *See* Brief for Respondents at 12-13 n.7. On its face (P.A. 168a) and as administered, the policy excludes such persons from benefits.[5] In addition, the effect of the policy is to deny in-state benefits to large groups of citizens, *e.g.*, out-of-state residents. *See* Brief of Petitioners at 4-5.

But even if the policy were limited in its exclusionary effect to nonimmigrant aliens, this does not mark the

[4] Both *Mauclet* and *Graham v. Richardson*, 403 U.S. 365 (1971) involved state classifications that theoretically imposed no absolute ban to all aliens but as a practical matter disadvantaged the entire class and, most importantly, all permanent resident aliens.

[5] It is interesting that after almost seven years of litigation, during which the University has consistently pointed to the policy's exclusion of Armed Forces personnel assigned to attend the University by the military (*see, e.g.*, Transcript of Argument before this Court on Feb. 22, 1978, at 4), the respondents would suggest for the first time a tortured reading of the policy — inconsistent with commonsense and how the policy is administered — to assert that such military personnel are not excluded automatically as are nonimmigrants.

classification for strict scrutiny. Even the lower courts did not hold "nonresident aliens" to be a suspect class deserving of heightened protection, *see Moreno v. Toll*, 489 F. Supp. 658, 663 (D. Md. 1980), a conclusion the respondents now challenge. Brief for Respondents at 15-16. The decisions below simply and erroneously found nonimmigrant aliens to be "resident aliens" within the meaning of this Court's alienage equal protection cases.

However, both the use of the term "resident alien" by this Court and the rationale of its equal protection cases demonstrate the error of this position. A "resident alien" is not an alien who is simply "present and dwelling" in the United States, as the district court held, 489 F. Supp. at 663 n.8, or an alien who can establish domicile in this country and in the State, as the international bank students argue in the alternative.[6] *See* Brief for Respon-

[6] When this case was last argued before this Court, in 1978, Justice Stevens engaged in the following colloquy with counsel for respondents on the contention that domicile could be the only constitutional basis for the University's policy (Transcript of Argument, Feb. 22, 1978, at 36-37):

> QUESTION: Isn't it true that the university is entitled to draw some line and when you get real close to that line, it's going to have an appearance of arbitrariness.
>
> MR. SCANLAN: Well, the university is entitled to draw the line that is drawn, namely, domicile. What it is not entitled to do—
>
> QUESTION: Why isn't it entitled to draw the line at permanent resident just the way the first paragraph of their general policy does? Immigrant aliens lawfully admitted for permanent residence.
>
> MR. SCANLAN: Because there you are right back on the equal protection point. The *Mathews v. Diaz* case, written by you Honor, involved the Federal power. And the Court, speaking through you, Mr. Justice Stevens, made it perfectly clear in that case and again in *Nyquist* the Federal Government can have powers of classification over aliens and subclasses of aliens that is denied the States, because the Federal power is also based on the foreign relations policy of this country, which is none of the

dents at 16. A "resident alien" is one who bears so many of the burdens associated with citizenship that it is irrational to deny him the benefits accorded citizens. Resident aliens, like citizens, pay their full share of taxes, support the economy, serve in the armed forces, and obey our laws. Thus, "[i]t is appropriate that a State bear a heavy burden when it deprives them of [benefits]." *In re Griffiths*, 413 U.S. 717, 722 (1973).[7] In essence, the characteristics of resident aliens are the very rationale of strict scrutiny.

Nonimmigrant aliens as a general proposition do not pay their full share of taxes. Some are simply not in the country long enough to contribute significantly to a state's economy. Others, like the parents of the respondents, are the beneficiaries of significant income tax advantages.[8] All nonimmigrants are exempt from mandatory draft registration. 50 U.S.C. § 453. And, to a degree, certain nonimmi-

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business of the States, much less the University of Maryland.

QUESTION: That really doesn't respond to the question, because I think you would concede that the university would not have to admit all aliens, say, illegal aliens or persons here on temporary visas. You wouldn't contend that.

MR. SCANLAN: No. I would concede there are classes of aliens that the university would be entitled to say, "Well, on your face you cannot show your domicile is here. Your visa says you have an intention—

QUESTION: But the Constitution doesn't require domicile to be the test.

[7] This language in *Griffiths* undercuts the students' contention that this Court has only focused on the characteristics of resident aliens when determining whether a state interest justifying discrimination against aliens is "compelling".

[8] The international bank students' suggestion that E visa holders do not share the tax advantages afforded most categories of nonimmigrants, even if true, would not, of course, undercut the truth of the general proposition or render substantially overinclusive the university's classification. Moreover, Revenue Ruling 64-285 accords E-visa holders the benefits of 26 U.S.C. § 871 for one year.

grants, such as diplomats and employees of international organizations, need not obey our laws, because of statutory immunity. *See* 22 U.S.C. § 288d. In short, nonimmigrant aliens do not bear the burdens assumed by citizens and permanent resident aliens and the State should not bear a heavy burden to justify classifications that disadvantage them.[9]

If strict scrutiny is not the applicable standard to measure classifications disadvantaging nonimmigrants, the University's policy need only be supported by some rational justification. *Califano v. Jobst*, 434 U.S. 47 (1977). And nothing advanced by the international bank students even remotely meets *their burden* of demonstrating that the University's policy is wholly without a rational basis.

Their assertion that the cost equalization rationale is suspect because some Maryland citizens are the beneficiaries of particular tax exemptions such as social security and retirement befefits and that some spouses of international bank employees pay some income tax is disingenuous. To collect more than two billion dollars in state income taxes, the great majority of state citizens and resident aliens must be contributing their share. In addition, it is difficult to analogize the situation of pensioners and other low income beneficiaries with that of international bank employees whose lucrative salaries and fringe benefits are exempt from federal and state income tax from the date they become employed in this country.[10]

[9] This Court has also repeatedly used the term "resident alien" to mean a lawfully admitted permanent resident alien and thus, to exclude nonimmigrants. *See* Cabell v. Chavez-Salido, 50 U.S.L.W. 4095 (U.S. Jan. 12, 1981) (both majority and dissenting opinions); Nyquist v. Mauclet, 432 U.S. 1, 7 n.8 (1977); Rosenberg v. Fleuti, 374 U.S. 449 (1963).

[10] The respondents observed below that an international bank employee may retire in this country and adjust his status at that time because his children may have become U.S. citizens and he

Moreover, for purposes of equal protection analysis, the classification is gauged by reference to broad general characteristics, "rather than by focusing on selected, atypical examples." *Califano v. Jobst*, 434 U.S. at 55.[11]

Finally, G-4 aliens' possible payment of property taxes, fuel taxes, and motor vehicle taxes does not help their position in the case. All of these taxes are for special enterprises, such as public elementary and secondary schools, bonds, and roads. These taxes do not support the University of Maryland.

For all of these reasons, the University contends that its policy need only meet a rational basis equal protection standard and that under this standard its treatment of nonimmigrants is constitutionally sound.

II.

THE UNIVERSITY'S IN-STATE POLICY DOES NOT VIOLATE DUE PROCESS.

The international bank students now contend that the lower court found "as a fact" that the University's policy was primarily concerned with domicile prior to 1978 and

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may qualify for admission to the United States without regard to quotas. *See* Plaintiffs' Memorandum in Support of Summary Judgment at 27 (R. 191). Thus, such nonimmigrants may escape the payment of substantial amounts of tax for protracted periods.

[11] Likewise, the international bank students gain little by suggesting that permanent resident aliens holding a G-4 visa are also exempt from income tax on their salaries. First, as the respondents below argued, bank policies discourage such adjustments by their employees. Thus, few individuals (if any) fall into this category. As far as international bank students at the University of Maryland are concerned, the petitioners are not aware of any who are permanent resident aliens (and the record certainly does not establish that any such individuals exist). Second, it is important to note that citizens who work for the bank are not exempt from income tax on their compensation.

that this factual finding is subject to the "clearly erroneous" rule. Brief for Respondents at 39. However, the lower court, ruling on summary judgment, declined to base its legal conclusion on the record in the case. *Moreno v. Toll*, 480 F. Supp. 1116, 1123 (D. Md. 1979). Thus, it made no factual finding deserving of the clearly erroneous standard.[12]

The students also try to reshape and resurrect the irrebuttable presumption doctrine by contending that "flat objective requirements or exclusions" are permissible under due process but the classification at issue here is not. The petitioners submit that the University's denial of in-state benefits to nonimmigrants *is* a flat exclusion and that any attempt to salvage the irrebuttable presumption doctrine on such distinctions must founder in the wake of this Court's post-*Vlandis* cases.[13]

Finally, the University vigorously disputes the international bank students' contention that they have a "property right" or "liberty interest" in University benefits deserving of due process protection. The in-state policy confers no such right and affects no such interest and the respondents' position is without any support in the relevant case law.

For these reasons and those stated in the Brief of Petitioners, the University contends that its in-state policy did not offend due process.

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[12] The international bank students' contentions regarding the basis of the University's policy from 1976-78 are answered in the appendix to this brief.

[13] The respondents' new irrebuttable presumption doctrine is so artificial as to be impossible for any court to administer in a reasoned fashion.

III.

THE UNIVERSITY'S IN-STATE POLICY DOES NOT VIOLATE THE SUPREMACY CLAUSE BY INTERFERING WITH INTERNATIONAL AGREEMENTS OF THE WORLD BANK AND INTER-AMERICAN DEVELOPMENT BANK.

The respondents and the amici international banks that have borne the cost of this litigation and stand to benefit from a result favorable to respondents (Brief of Banks at 13) argue as an alternate ground for sustaining the lower court decision that the University's in-state policy somehow interferes with the objectives of the agreements establishing the banks and conferring a tax exemption on bank compensation. However, this position was rejected by the lower court as "too attentuated" a conflict between state and bank policies. 489 F. Supp. at 667.[14] So too should it be rejected by this Court as factually unsupported and legally unsound.[15]

The international bank students and the international banks contend that the University is penalizing them because of the tax exemption World Bank and Inter-American Development Bank salaries receive pursuant to the respective agreements of these international organizations. In so arguing, they point to nothing in the agreements themselves that bars the University of Maryland or any other institution from charging G-4 students or any other nonimmigrant a higher tuition rate than that charged to citizens and permanent resident aliens. Moreover, they can point to nothing in the language of the University's in-state policy that denies a G-4 student in-state status solely on the basis of a treaty-based tax exemption. The policy simply excludes nonimmigrants and G-4's happen to fall into that category. Rather, they attack

[14] This issue was not decided by the court of appeals.

[15] The banks belatedly attempt to supplement the record with self-serving declarations filed in a never-tried circuit court case in Montgomery County. *See* Brief for Banks at 12-13.

one of the University's *rationales* for excluding nonimmigrant aliens (including G-4's) from qualifying for in-state status, *viz.*, that nonimmigrants as a class either because of the short period they stay in this country or because of privileged tax status do not fully or effectively contribute to the cost of education at the University. And they contend that this rationale conflicts with a purported *rationale* of the international agreements. Never before has a supremacy clause argument been premised on such a concocted clash of policies.

It was incombent upon the respondents to show below that a "conflict" exists between the international agreements and the University's in-state policy. *Clark v. Allen*, 331 U.S. 503, 508 (1947); *Terrace v. Thompson*, 263 U.S. 197, 223 (1923). As noted eariler, there is no conflict between the language of the international agreements and the University's policy. If the State tried to tax the salaries of bank employees when such taxation was barred by the agreements, or denied them an educational benefit that was conferred by the agreements, then a conflict might arise. But that is not the case here. Among all the privileges conferred upon employees by the bank agreements and the International Organizations Immunities Act, the right to preferential public tuition is neither expressly mentioned nor necessarily implied.

International bank employees already receive generous dependency allowances to support their children's needs, Senate Report No. 94-1009, *Foreign Assistance and Related Programs Appropriation Bill*, 1977 (94th Cong., 2d Sess.) at 104-05. And these employees also receive a tuition equalization subsidy that pays the difference between in-state and out-of-state tuition. Brief of Banks at 13. Thus, existing personnel policies of the international banks ensure that the residency rules of the University of Maryland and most other public colleges and universities

pose no financial burden to employees. More importantly, however, the federal government, which is a party to the agreements in question that bar federal income taxation, presently denies various education benefits to G-4's and other nonimmigrants who do not attempt to adjust their immigration status. *See, e.g.*, 34 C.F.R. § 201(a). And both the President and Congress have been vocal critics of the banks' lucrative fringe benefits. *See* Foreign Assistance and Related Programs Bill, 1978, Sen. Rept. No. 95-352, 95th Cong., 1st Sess., at 121 (May 18, 1977). Thus, it is difficult to impute a federal policy of shifting the cost of such unnecessary benefits to state taxpayers.

Finally, it should be noted that the University's policy denies in-state status to nonimmigrants, regardless of their actual income tax contributions (just as it automatically denies in-state status to citizens in the Armed Forces who are assigned for educational purposes to the University without looking into actual tax contributions). This results in a denial of benefits to G-4's whose tax exemption is dependent upon federal law as well as to those whose exemption is dependent upon treaty.[16] In short, the in-state policy does not look to an international agreement or interfere with it in any conceivable way.

[16] And only a small number of international organization employees fall into the latter category.

CONCLUSION

In summary, the petitioners contend that the due process, equal protection, and supremacy clauses do not mandate invalidation of the University's in-state policy. For these reasons, and for those appearing in the Brief of Petitioners and the Brief of Alabama, et al., as amici curiae, the judgment of the Court of Appeals should be reversed and *Vlandis v. Kline*, 412 U.S. 441 (1973), should be overruled.

Respectfully submitted,

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APPENDIX

Summary Responses to Respondents' Contentions

Many of the contentions made by the international bank students can be answered in abbreviated fashion or by citation to existing authority or references to material contained in the earlier briefs of petitioners. For the convenience of the Court, petitioners provide these summary responses to these arguments.

Contention of Respondents:	*The University's Response:*
1. The U.S. Attorney General has concluded that international bank employees cannot waive their tax exemption. Brief at 2, N. 2.	1. The Attorney General has said only that Congress cannot waive these exemptions by statute. 41 Op. Atty. Gen. 170 (1954).
2. It is difficult for bank employees to adjust their status to permanent resident alien. Brief at 17, N. 11.	2. The banks' own loosely-worded agreements leave plenty of room for individual adjustments.
3. G-4 visa holders include clerical personnel for whom the tuition differential could make a significant difference. Brief at 20, N. 15.	3. Nonimmigrant aliens as a class and G-4 aliens are not precluded from qualifying for state scholarships which are awarded if an applicant can demonstrate, *inter alia*, financial need. 50 Op. Md. Atty. Gen. 155 (1965).
4. The denial of a higher education is at issue here because in-state status also includes preference for admission. Brief at 20, N. 15.	4. None of the respondents were denied admission, nor is such a likelihood in light of declining enrollments. In any event, the lower court issued no relief regarding admission. (P.A. 48a & 99a).
5. The Federal Government does not exclude all nonimmigrants from eligibility for low interest student loans. Brief at 21, N. 17.	5. To meet the requirements of 34 C.F.R. § 201(a), a nonimmigrant alien at the very least must have applied for a change in visa status to that of a permanent resident alien.

Contention of Respondents:	*The University's Response:*
6. Most nonimmigrants are incapable as a matter of federal law of acquiring domicile. Brief at 26.	6. Of the 12 general categories of nonimmigrants, only 4 are required to "have a residence in a foreign country which [they] have no intention of abandoning." 8 U.S.C. § 1101(a)(15)(B), (F), (H) and (J).
7. State laws which impose discriminatory burdens on the residence of aliens conflict with the Supremacy Clause. Brief at 28.	7. Only State classifications which strike at the noncitizen's ability to exist in the community are at odds with the congressional determination to admit the alien to permanent residence. *Foley v. Connelie*, 435 U.S. 291, 295 (1978).
8. The amicus brief of the United States in *Plyler v. Doe* and *In Re Alien Children Education Litigation* (No. 80-1538 & 80-1934) agrees with respondents' view that the University's policy is a prohibited attempt to regulate immigration. Brief at 32.	8. The brief of the United States notes at 16, N. 11, that the "education of aliens is not a . . . central concern of the immigration laws."
9. If the July 13, 1976 district court order had been stayed without conditions, the University would have a valid argument under the 11th Amendment. Brief at 43.	9. The only relevant condition contained in the 1976 order, viz., that it be "finally affirmed" on appealed, never occurred.
10. The 1976 district court order was not vacated. Brief at 45.	10. Because of the remand from this Court, the district court could not have kept the 1976 order requiring due process in tact and at the same time consider anew the due process issue.

Contention of Respondents:	*The University's Response:*
11. Rule 60 of the Federal Rules of Civil Procedure permit the trial court to consider the due process issue without vacating its 1976 order. Brief. at 45, N. 37.	11. That rule applies only in cases of mistake, newly discovered evidence, fraud, etc., not here.
12. The June 1978 resolution of the Board of Regents showed a different basis for its in-state policy. Brief at 38, N. 28.	12. The resolution did not adopt a new in-state policy. Brief for Respondents at 47.
13. Prior to June 23, 1978, the University represented that its in-state policy was concerned with Maryland domicile. Addendum B to Brief for Respondents.	13. All the documentary evidence below showed that the denial of in-state status to the respondents was premised on two grounds: the University's interpretation of the law of domicile *and* the Policy's rationale of cost equalization. Brief of Petitioners at 6-7.*

* Nothing in the petitioners' answers to interrogatories or requests for admission undercuts the existence of the cost equalization purpose for the Policy. For example, in response to the request for admissions, the University denied:

> The fact that the "G-4 alien" parent, upon whom a "G-4 alien" student is financially dependent, pays Maryland income tax on some unearned income but on no earned income, is relevant to the *determination* made pursuant to the above-mentioned University of Maryland policy, "Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes" that such "G-4 alien" student will not be granted in-state status. (Emphasis added).

This denial is as true today as it was when made. The policy by its own terms denies benefits to nonimmigrant aliens. It does not permit a "determination" to be made with respect to the *actual* tax contributions of this class. It rationally excludes such persons from benefits, *inter alia*, because the class is generally composed of those who are here for temporary periods and thus have not contributed to the State's economy or those who, like the students' fathers, are not subject to the full range of state taxation. On the other hand, permanent resident aliens as a class are on a citizenship track, pay taxes precisely like U. S. citizens, and the great majority of them remain here indefinitely. *See* G. Rosburg, *Aliens and Equal Protection: Why Not the*

Right to Vote?, 75 Mich. L. Rev. 1092, 1110-11 (1977); *Nyquist v. Mauclet*, 432 U.S. 1, 12 (1977). Thus, for such a class, the policy does not focus *solely* on actual state income tax contributions. *See* Defendants' Answers to Plaintiffs' Requests for Admission (R. 142). Indeed, the *students'* memoranda of law, such as that filed in support of their motion for summary judgment, characterized cost equalization as an "objective" of the policy (R. 183), noted that the University had emphasized the importance of the policy of cost equalization as the basis for denying their appeals (R. 163), and argued against the rationality of this objective (R. 193).